

Attorney Docket No.: J6699/1(C)
Serial No.: 10/050,238
Filed: January 16, 2002
Confirmation No.: 6809

BRIEF FOR APPELLANT

Sir:

This is a Brief on appellant's Appeal from the Examiner's Final Rejection concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18.; 37 C.F.R. §1.136.

AMENDED BRIEF FOR APPELLANT

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I. Real Party in Interest

The real party in interest is Unilever Home and Personal Care USA, Division of Conopco, Inc., a corporation of New York, having a principal place of business at 33 Benedict Place, Greenwich, Connecticut 06830.

II. Related Appeals and Interferences

None

III. Status of Claims

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

Thirteen (13) claims are presently pending. The claims were originally filed as claims 1-13, but independent claim 22 now corresponds to former claim 1, claims 1-4 have been cancelled and claims 23, 5-7, 9-13 and 19-21 depend on 22.

B. STATUS OF THE CLAIMS

All remaining claims (independent claim 22, claim 23 and claims 5-7, 9-13 and 19-21) have been rejected.

C. CLAIMS ON APPEAL

Claims 22, 23, 5-7, 9-13 and 19-21 are on appeal.

IV. Status of Amendments

Claim 4 was deleted after final, and this proposed amendment will be entered for purposes of appeal (see Advisory Action, Box 7b). Accordingly, claims now pending are independent process claim 22 and dependent claims 5-7, 9-13, 19-21 and 23.

V. Summary of the Claimed Subject Matter

The subject matter of independent process claim 22 relates to a process for making a wet skin treatment composition. More specifically, independent claim 22 is mapped out in greater detail below (referring to specification by page and line number) as set for below:

	CLAIM ELEMENT	SPECIFICATION
(1)	Claim 22: A process for making a wet skin treatment composition comprising the steps of:	Page 4, lines 13-14; Page 4, line 22
(2)	forming an aqueous phase comprising	Page 4, line 24
(3)	less than 1% anionic	Examples 1A-B (0.92%), Examples 1C-D (0% anionic), Example 3 (0% anionic), Examples 5-10 and Example 8H (surfactant free)
(4)	water and dispersion stabilizer	Page 4, line 24
(5)	wherein said dispersion stabilizer is selected from inorganic dispersion stabilizers selected from clays, silicas and mixtures thereof	Page 12, lines 15-17

	CLAIM ELEMENT	SPECIFICATION
(6)	organic stabilizers having MW lower than about 1000 Daltons and capable of forming a network in the aqueous phase that immobilizes the dispersed structured oil phase	Page 12, lines 24-26
(7)	wherein said organic stabilizer is selected from the group consisting of glycol mono-, di- and triesters having 14 to 22 atoms carbon alone and mixtures thereof	Page 12, line 27 to page 13, line 2
(8)	and polymeric stabizers selected from carbohydrate gums, acrylate-containing homo and co-polymers and mixtures thereof	Page 13, line 22 to page 14, line 4
(9)	forming a structured oil phase comprising	Page 4, line 26
(10)	a liquid oil	Page 4, line 28
(11)	selected from triglycerides, modified triglycerides, or their mixtures	Page 7, line 28 to page 8, line 3
(12)	and a structurant present in an amount to yield viscosity of 100 to 5000 poise measured at 1 sec ⁻¹ at 25°C	Page 9, lines 9-13
(13)	and which structurant forms a stable 3-dimensional network	Page 9, lines 22-23

	CLAIM ELEMENT	SPECIFICATION
(14)	comprising finely divided solid particles having a particle size below about 25 microns, wherein said particles are present in said oil at a temperature below 35°C	Page 9, lines 1-7
(15)	wherein said structurant is trihydroxystearin	Page 10, line 30
(16)	directly mixing said structured oil phase and said aqueous phase to form a structured oil-in-water pre-dispersion having weight average droplet size of greater than about 100 microns	Page 18, lines 24-28
(17)	passing said structured oil-in-water pre-dispersion through a screen having an opening of up to 2000 micrometers to make the wet skin treatment composition having oil drops of about 20 to 300 microns in size	Page 19, lines 1-3
	OTHER CLAIMS	
Claim 23	Process according to claim 22, where dispersion has droplet size greater than about 300 micron	Page 18, line 28
Claim 5	A process according to claim 22, where weight average droplet size in the pre-dispersion is greater than 100 to less than or equal to 500 microns	Page 18, line 27 and original claim 5

	CLAIM ELEMENT	SPECIFICATION
Claim 6	A process according to claim 22, where structured oil phase has a wt. average droplet size in the range of 20 to 200	Page 11, line 11 and original claim 6
Claim 7	A process according to claim 22, wherein structured oil phase has viscosity in the range of 200 to 2000 poise at shear rate of 1 sec^{-1} and temperature of 25°C	Original claim 7
Claims 9-13	All same as original claims, but dependent on claim 22, not claim 8	Supported by specification and original claims 9-13
Claim 19	A process according to claim 22, wherein aqueous phase contains less than 1% surfactant	Examples 1A-B (0.92%), Examples 1C-D (0%), Example 3 (0%), Examples 5-10 and Example 8H (surfactant free)
Claim 20	A process according to claim 22, wherein aqueous phase is free of anionic surfactant	Examples 1C-D, Example 3, Examples 5-10 and Example 8H
Claim 21	A process according to claim 22 wherein aqueous phase is free of anioninc surfactant	Example 8H

VI. Grounds of Rejection to be Reviewed Upon Appeal

The Grounds of Rejection to be Reviewed Upon Appeal are defined by the Examiner's rejections and are as follows:

- I. Claims 4-7 [sic 5-7], 9-13 and 19-23 (pending and examined) are said to be obvious, under 35 U.S.C. §103(a), over U.S. Patent No. 6,080,708 to Glenn, Jr. et al. (equivalent to WO 96/25144), in view of U.S. Patent No. 6,395,640 to Tsaur.
- II. Claims 19 and 21 are said to be obvious, under 35 U.S. C. §103(a), over U.S. Patent No. 6,080,703 to Glenn, Jr. et al. (equivalent to WO 96/25144), in view of U.S. Patent No. 6,395,690 as applied to claims above, and further in view of U.S. Patent No. 5,004,598 to Lochhead et al.

VII. Argument

- I. Claims 4-7 [sic 5-7], 9-13 and 19-23 as obvious, under 35 U.S.C. §103(a), over U.S. Patent No. 6,080,708 to Glenn, Jr. in view of U.S. Patent No. 6,395,640 to Tsauro.

The present independent claim 22 is directed to a process which ensures that sufficient benefit agent is retained on the skin, after rinsing or towel drying, without leaving the skin excessively oily (page 2, lines 1-4). Conventional oil-in-water emulsions are poorly retained and, conversely, water-in-oil emulsions are well retained but excessively greasy (page 2, lines 12-17).

In order to achieve better retention of oil on skin while also providing less greasy feel, applicants discovered the use of oil-in-water compositions where oil (e.g., petrolatum, sunflower seed oil) is specifically structured with a structurant forming a stable 3-D network comprising finely divided solid particles having a particle size below about 25 microns. The structurant, as per amended claims, is specifically trihydroxystearin. However, the structurant, whatever it is, must still meet the “finely divided” and “particle size” requirements of the claim.

Applicants have argued that, to the extent trihydroxystearin is disclosed specifically in U.S. Patent No. 6,080,708 to Glenn, Jr. (hereinafter, “Glenn”), it is disclosed as a preferred aqueous phase stabilizer (col. 5, lines 18-23). It is also disclosed in specific examples where, for example, petrolatum is used in the oil mineral phase and trihydroxystearin is used as aqueous phase stabilizer (see Examples 1-4 at col. 18, for example).

In response, the Examiner argues:

- 1) Glenn broadly teaches structurants for the oil-phase which include organic structurants such as fats, fatty acid derivatives, solid fatty esters, fatty

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alcohols, wax, petrolatum, etc. Thus, to the extent trihydroxystearin is a fatty acid ester, the disclosure of “fatty acid ester” suggests use of said trihydroxystearin; and

- 2) A reference is not limited to its preferred embodiments (e.g., trihydroxystearin exemplified as stabilizer in aqueous phase) and the trihydroxystearin thus (or presumably as encompassed under “fatty acid ester”) could be used in oil phase as an oil phase structurant.

With regard to the Examiner’s first point that trihydroxystearin is encompassed under fatty acid ester, applicants initially note that the extremely broad recitation of fatty acid ester would not lead to the selection of trihydroxystearin. This is particularly the case when the trihydroxystearin is taught in the same reference as an aqueous phase stabilizer. Of the thousands upon thousands of fatty acid esters one could choose as an oil phase structurant, there would be no reason whatsoever to use a component which was used as an aqueous phase stabilizer in the same reference.

Further, as applicants set forth at page 7 of their “Amendment After Final In Response to Office Action Mailed July 24, 2008” (Point #3), if a person of ordinary skill in the art were looking to enhance deposition (the object of the invention), they would not contemplate using a “stabilizer” (and trihydroxystearin is clearly directed to be used as stabilizer in Glenn) because such person of ordinary skill in the art would believe a destabilizer would be needed in order to cause the floc formation which is a requisite for enhanced deposition. Thus, not only would one have to select trihydroxystearin from among thousands of fatty acid esters, but one of ordinary skill in the art would not want to select a “stabilizer” (in whatever category) because they would believe such stabilizer would decrease deposition. Under the standards of KSR, the selection of a “stabilizer” to enhance deposition would be completely unpredictable. This unpredictability is further magnified by the “selection” aspect of trihydroxystearin among thousands of molecules.

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Moreover, it is not “any” trihydroxystearin which causes the enhanced deposition unexpectedly observed, but it is one which comprises finely divided solid particles of size below about 25 microns. Thus, although broad ranges of oil phase structurants are disclosed in Glenn, not only is it unclear that it is specifically trihydroxystearin which must be selected (from potentially thousands of fatty acid esters, let alone thousands of other types of structurants), but it is completely unpredictable that the structurant would have to have critical particle size to function in the unexpected manner observed by applicants of the subject invention.

The second argument made by the Examiner relates to the reference not being limited to its preferred embodiments. While this is true, as applicants have explained above, the only way trihydroxystearin would have been used as an oil phase structurant would have been as a selection from any of thousands of possible fatty acid esters. As applicants have noted: (a) since trihydroxystearin is disclosed in Glenn as a so-called stabilizer, there would have been every incentive not to choose it to use in the oil phase where it would have been thought to inhibit deposition (i.e., not to cause floc formation required for deposition); and (b) it would in any event have to meet “fine particle” and “particle size” limitations absolutely not recognized as critical in Glenn.

In view of the failure of Glenn as a primary reference, it is believed that the combination of Glenn with Tsaur would never occur.

In view of these arguments, it is believed that the rejection in view of Glenn in combination with Tsaur should be withdrawn.

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- II. Claims 19 and 21 are obvious, under 35 U.S. C. §103(a), over U.S. Patent No. 6,080,708 to Glenn, Jr. in view of U.S. Patent No. 6,395,695 as applied to claims above, and further in view of U.S. Patent No. 5,004,598 to Lockheed.

Claim 19 is dependent on independent claim 22 and additionally claims a process where the aqueous phase contains less than 1% surfactant. Claim 21 is also dependent on independent claim 22 and additionally claims a process where the aqueous phase is free of surfactant.

Again, the primary reference here is Glenn and the Examiner argues it would be obvious to use process of claim 22 wherein oil phase structurant is trihydroxystearin. For reasons noted in connection with rejection of claim 22, it is believed that it would have been completely unpredictable to select use of trihydroxystearin. That is, this compound is taught as stabilizer; such stabilizer would be believed to decrease, not enhance, deposition; and, in any event, even if such specific component was contemplated (which it was not), there is no appreciation that it would have to have "fine particle" and size attributes required to achieve benefits observed.

With regard to the combination of Glenn with Tsaur (relating to passing structured oil-in-water dispersion through screen to obtain drops of 20 to 300 microns), even if the process step were applied, since it would be applied to a different composition, the benefit of using such process with the composition of the invention would not be seen. That is, the fundamental issue of using a different composition is not resolved.

At page 5 of the July 24, 2008 Final Office Action, last paragraph, the Examiner suggests also that emulsions of Glenn containing 0.5 to 8 parts C₈-C₁₄ soap meets the limitations of less than 1% soap. (col. 7, lines 44-46 of Glenn). However, the fact that preferred compositions may contain 0.5 parts soap (anionic), for example, does not mean the composition cannot contain other anionics (e.g., synthetic anionics). Indeed,

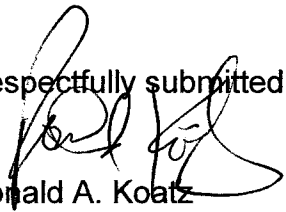
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there does not appear to be a single example in the Examples (1-11) where there is not present well above 1% soap and/or other anionic. In Examples 1-4, for example, there is at least 3% anionic (Example 4); in Examples 5-7, at least 8-10% anionic (Example 6) and in Examples 8-11, well over 17% anionic in all examples. With regard to claim 21, there is certainly no absence of surfactant.

With regard to U.S. Patent No. 5,004,598 to Lochhead, this does nothing to remedy the fundamental deficiencies of Glenn or Glenn combined with Tsaur. It is thus irrelevant whether or not Lochhead discloses systems without surfactant.

In view of arguments above, applicants respectfully request that the Board of Patent Appeal and Interference reverse the Examiner's final rejection.

Respectfully submitted,



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VIII. Claims Appendix

The text of claims included in the appeal is:

22. Process for making a wet-skin treatment composition comprising the steps of:
- i) forming an aqueous phase comprising less than 1% anionic surfactant, water and dispersion stabilizer, wherein said dispersion stabilizer is selected from inorganic dispersion stabilizers selected from clays, silicas and mixtures thereof; organic stabilizers having a molecular weight lower than about 1000 Daltons and capable of forming a network in the aqueous phase that immobilizes a dispersed structured oil phase and wherein said organic stabilizer is selected from the group consisting glycol mono-, di- and triesters having 14 to 22 atoms carbon alone and mixtures thereof; and polymeric stabilizers selected from carbohydrate gums, acrylate-containing homo and co-polymers and mixtures thereof,
 - ii) forming a structured oil phase comprising a liquid oil selected from triglycerides, modified triglycerides, or their mixtures and a structurant present in an amount to yield viscosity of 100 to 5000 poise measured at 1 sec^{-1} at 25°C and which structurant forms a stable 3-dimensional network comprising finely divided solid particles having a particle size below about 25 microns, wherein said particles are present in said liquid oil at a temperature below 35°C ; wherein said structurant is trihydroxystearin;
 - iii) directly mixing said structured oil phase and said aqueous phase to form a structured oil-in-water predispersion having weight average droplet size of greater than about 100 microns;
 - iv) passing said structured oil-in-water predispersion through a screen having an opening of up to about 2000 micrometers to make the wet skin treatment composition having oil drops of about 20 to 300 microns in size;

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wherein the wet-skin composition formed has foaming volume of less than 5 cc when measured by the Solution Shake Test.

23. A process according to claim 22 wherein the structured oil-in-water predispersion has a droplet size greater than about 300 microns.
5. A process according to claim 22, wherein weight average droplet size of the structured oil-in-water pre-dispersion is greater than 100 to less than or equal to 500 microns.
6. A process according to claim 22, wherein the structured oil phase has a weight average droplet size in the range of 20 to about 200 microns.
7. A process according to claim 22, wherein the structured oil phase has a viscosity in the range of 200 to 2000 poise at a shear rate of 1 sec⁻¹ and a temperature of 25°C.
9. A process according to claim 22: The process according to claim 1, wherein said composition additionally comprises a functional skin benefit agent selected from the group consisting of humectants, occlusive agents, barrier lipids, skin repair agents, UV screens, vitamins, skin lightening agents, antimicrobials, antioxidants, and mixtures thereof.
10. A process according to claim 22, wherein said composition additionally comprises a sensory modifier selected from the group consisting of emollients, skin conditioning agents, perfumes, distributing agents, chemosensory agents and mixtures thereof.
11. A process according to claim 22, wherein said composition additionally comprises a chemical preservative.

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12. A process according to claim 22, wherein said composition additionally comprises a chelating agent.
 13. A process according to claim 22, wherein said composition additionally comprises an essential oil.
 19. A process according to claim 22, wherein the aqueous phase contains less than 1% of a surfactant.
 20. A process according to claim 22, wherein the aqueous phase is free of anionic surfactant.
 21. A process according to claim 22, wherein the aqueous phase is free of surfactant.

IX. Evidence Appendix

None.

X. Related Proceedings Appendix

None.